

No. 97-1795

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.,
et al.,

Petitioners,

v.

CITY OF CINCINNATI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF *AMICUS CURIAE*
THE NATIONAL FAIR HOUSING ALLIANCE
IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a federal court of appeals err when it construes the Equal Protection Clause to permit a political majority to restructure the political processes of a city government to the unique detriment of a political minority?
2. Does a federal court of appeals err when it does not require proof of a compelling state interest to justify a law that impairs the ability of a particular group to participate fully in the political process?
3. Does a federal court of appeals err when it construes the Equal Protection Clause to allow a municipal government to take actions that would be forbidden to a State government?

LIST OF PARTIES

The parties to the proceedings below were petitioners Equality Foundation of Greater Cincinnati, Inc.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; and H.O.M.E., Inc.; and respondents City of Cincinnati; Equal Rights Not Special Rights; Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore.

These parties, through counsel, have granted their consent to the National Fair Housing Alliance to file this brief as an *amicus curiae*. Copies of the letters granting consent have been filed with the Clerk.

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BRIEF OF *AMICUS CURIAE*
THE NATIONAL FAIR HOUSING ALLIANCE
IN SUPPORT OF PETITIONERS

The National Fair Housing Alliance, as *amicus curiae*, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 23, 1997 (petition for rehearing and suggestion for rehearing *en banc* denied February 5, 1998).¹

¹ Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus* states that no counsel for a party has authored any part of this brief, and no person or entity, other than the *amicus*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

INTERESTS OF THE *AMICUS CURIAE*

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation that represents private fair housing centers throughout the United States. NFHA's purpose is the achievement of "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." It attempts to fulfill that purpose by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, and sponsoring national education conferences on fair housing issues and fair housing litigation. NFHA also attempts to identify and eliminate housing practices that are discriminatory and that constitute barriers to equal access to housing. NFHA has a direct interest in the application of statutes protecting against discrimination in housing, including local ordinances. To this end, NFHA seeks leave to participate as *amicus curiae* in those cases that involve the Constitution of the United States as it affects fair housing laws and ordinances.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit for which *amicus* urges review on certiorari is reported at 128 F.3d 289. The Sixth Circuit rendered that opinion after its first opinion in this matter, which is reported at 54 F.3d 261, was vacated by this Court at 116 S.Ct. 2519 and remanded for further consideration in light of this Court's opinion in *Romer v. Evans*, 116 S.Ct. 1620 (1996). Also relevant are the opinions of the United States District Court for the Southern District of Ohio granting petitioners' motion for preliminary injunction, 838 F. Supp. 1235, and granting a permanent injunction, 860 F. Supp. 417.

JURISDICTION

Respondents invoked the jurisdiction of the Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1291 to

appeal the judgment of the United States District Court for the Southern District of Ohio. The Sixth Circuit reversed the District Court, vacated the court's permanent injunction, and remanded the case to the District Court for entry of judgment for respondents.

Petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review the judgment of the Sixth Circuit. This Court granted the petition, vacated the judgment, and remanded the case for further consideration. On remand, the Sixth Circuit again held for respondents. Petitioners filed a petition for rehearing and suggestion for rehearing *en banc* that the court denied on February 5, 1998. See Pet'r Br., App. 126a.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CITY CHARTER PROVISIONS INVOLVED

Cincinnati City Charter, Article XII:

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with

the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect.

STATEMENT OF THE CASE

In 1992, the Cincinnati City Council enacted an ordinance that prohibited discrimination based upon sexual orientation in the areas of private employment, public accommodations, and housing.

In 1993, respondent Equal Rights Not Special Rights gathered sufficient signatures to place on the ballot a proposed amendment to the Cincinnati City Charter that provided:

ARTICLE XII

NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect.

The proposed charter amendment passed, and petitioners filed a lawsuit challenging its constitutionality. Following a contested evidentiary hearing, which included evidence of housing discrimination against gay men, lesbians,

and bisexuals because of their sexual orientation, the United States District Court for the Southern District of Ohio granted petitioners' motion for a preliminary injunction against enforcement of the charter amendment. After a bench trial, the district court granted the petitioners' request for a permanent injunction.

Respondents appealed, and the Court of Appeals for the Sixth Circuit reversed, vacating the district court's permanent injunction and remanding the case for entry of judgment in favor of the respondents.

Petitioners then sought a writ of certiorari, which this Court granted. The Court vacated the judgment of the Sixth Circuit and remanded the case for further consideration in light of *Romer v. Evans*, 116 S.Ct. 1620 (1996).

On remand, the Sixth Circuit again upheld the charter amendment. Although the amendment's language was virtually identical to the Colorado constitutional amendment invalidated in *Romer*, the court held that it "merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences," in "stark contrast" to the "far broader language" of the Colorado amendment, which "could be construed to exclude homosexuals from the protection of every Colorado state law." 128 F.3d at 296. Ultimately, the Sixth Circuit held that the state-wide effect of the Colorado constitutional amendment distinguished *Romer* from the Cincinnati charter amendment. *Id.* at 301.

Petitioners sought a rehearing or a rehearing *en banc*, which was denied despite a strong dissent by six judges, who argued that the local effect of the charter amendment was "of no controlling significance for purposes of the Equal Protection Clause." *See* Pet'r Br., App. 133a. In conclusion, the dissenters stated:

We believe the panel decision in this case draws "distinctions without a difference" and failed to abide by the key ruling in *Romer* that "A law declaring that

in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

Id., quoting *Romer v. Evans*, 116 S.Ct. 1620, 1628 (1996).

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT THAT CONSTRUCT THE EQUAL PROTECTION CLAUSE TO PROHIBIT A POLITICAL MAJORITY FROM RESTRUCTURING THE GOVERNMENTAL DECISION-MAKING PROCESS TO THE UNIQUE DETRIMENT OF A POLITICAL MINORITY.

This Court has recognized that some of the laws structuring state political institutions or political processes make it difficult for political minorities to achieve their political aims. See *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 469-70 (1982). Such laws are permitted by the Equal Protection Clause if they allocate political power according to "neutral principles" that make it equally difficult for all groups to enact comparable laws. *Id.* at 470. But if a political majority enacts a law that departs from neutral principles by "subtly distort[ing] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation," then the law violates the Equal Protection Clause. *Id.* at 467.

The postulate that governmental decision-making processes must be structured according to neutral principles was one of the grounds for the decision in *Hunter v. Erickson*, 393 U.S. 385 (1969). Factually, the *Hunter* decision bears a striking resemblance to the present case. In 1964, the city council of Akron, Ohio passed a fair housing ordinance. Later, the voters of Akron amended the city charter to repeal the ordinance and to prevent the city

council from enacting any future fair housing ordinance without the approval of a majority of the voters. This Court held that the charter amendment violated the Equal Protection Clause because it created a "legislative structure" that imposed a "disadvantage" on a "particular group by making it more difficult to enact legislation on its behalf." *Id.* at 392-93.²

Two years later, the Court again examined the Equal Protection Clause's constraints on the structure of state political processes. At issue was an amendment to the West Virginia constitution that conditioned any increase of bonded indebtedness or taxes, beyond certain established rates, on approval of a 60% majority of the voters in the affected political subdivision. Distinguishing *Hunter*, the Court said:

The class singled out in *Hunter* was clear—"those who would benefit from laws barring racial, religious, or ancestral discriminations." In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote.

Gordon v. Lance, 403 U.S. 1, 6 (1971) (internal citations omitted). Concluding its opinion, the *Gordon* Court held that "so long as such [structural] provisions do not discriminate against . . . any identifiable class they do not violate the Equal Protection Clause."³ *Id.* at 7.

² In addition, the Court determined that the amendment was unconstitutional because it used an "explicitly racial classification." *Id.* at 389.

³ This Court has generally interpreted *Hunter* (and *Gordon*) to mean that restructuring of governmental decision-making processes violates the Equal Protection Clause when there is discrimination against an identifiable class. *E.g.*, *Town of Lockport v. Citizens for*

Later, in *Washington v. Seattle School Dist. No. 1*, this Court applied the *Hunter* principle to invalidate a Washington initiative removing the power of local school boards to assign students to schools away from their neighborhoods for purposes of racial desegregation. 458 U.S. 457 (1982). As in *Hunter*, one of the two grounds for the Court's decision was the racial classification implicit in the law. *Id.* at 472-73, 485-86. The other ground, germane to this case, was the law's failure "to allocate governmental power on the basis of any general principle." *Id.* at 470, quoting *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring). As the Court put it, "[t]he evil condemned by the *Hunter* Court was not the particular political obstacle . . . imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests." *Id.* at 474 n.17 (emphasis added).

That principle of structural neutrality is violated by the city charter amendment at issue. Under the charter amendment most citizens of Cincinnati have the right to seek legislation from the city council to achieve their particular interests, "while only members of the Plaintiffs' independently identifiable group must proceed via the exceptionally arduous and costly route of amending the City Charter before they may obtain any legislation bearing on their

Community Action at the Local Level, Inc., 430 U.S. 259, 268 n.13 (1977).

It did not apply *Hunter* in that manner when it upheld a California constitutional amendment requiring approval of lower-income housing projects by local voters in *James v. Valtierra*, 402 U.S. 137 (1971), a case it decided two months before *Gordon*. The justices who dissented from the *James* opinion, however, focused their argument on the application of the suspect classification doctrine to poverty. *Id.* at 144-45 (Marshall, J., dissenting). For that reason, the Colorado Supreme Court concluded that "*James* is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." *Evans v. Romer*, 854 P.2d 1270, 1282 n.21 (Colo. 1993) (*en banc*).

sexual orientation." *Equality Foundation*, 860 F. Supp. 417, 433 (S.D. Ohio 1994). There is no suggestion of a neutral, general principle governing this allocation of political power, which was unprecedented in Cincinnati's history. *Equality Foundation*, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993). Instead, the charter amendment simply precludes certain voters, independently identifiable by their sexual orientation,⁴ from obtaining legislation of particular interest to them. By restructuring the political process to the unique disadvantage of one group of Cincinnati voters, the charter amendment violates the Equal Protection Clause "in the most literal sense." *Romer v. Evans*, 116 S.Ct. 1620, 1628 (1996).

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT THAT REQUIRE PROOF OF A COMPELLING STATE INTEREST TO JUSTIFY A LAW THAT IMPAIRS THE ABILITY OF A PARTICULAR GROUP TO PARTICIPATE FULLY IN THE POLITICAL PROCESS.

This Court's decisions on discriminatory restructuring of governmental decision-making signify that a law impairing the ability of a particular group to participate fully in the political process can be justified only by a compelling state interest. In *Hunter v. Erickson*, for example, the Court based its decision on an analogy to the re-

⁴ As noted above, the *Gordon* Court focused its inquiry on whether the change made to the political process burdened a group that was identifiable by some characteristic—such as race or tax or military status—independent of its position on particular legislation. 403 U.S. at 5. Were it otherwise, any provision requiring a referendum to pass legislation would be suspect, since the legislation's supporters would have to bear the additional burden of a referendum. Under the rule of *Hunter* and *Gordon*, however, such a provision violates the Equal Protection Clause only if the legislation's supporters share some group characteristic extraneous to their position on the legislation. *Equality Foundation*, 860 F. Supp. 417, 434 n.12.

apportionment cases,⁵ declaring that "the State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." 393 U.S. 385, 393 (1969). Similarly, in *Gordon v. Lance*, the Court likened the issue of structural discrimination against an identifiable class of voters to discrimination in access to the ballot. 403 U.S. 1, 5 (1971).⁶

In neither case did the Court discuss the level of judicial scrutiny it used. Significantly, however, the precedents relied upon by the Court in *Hunter* and *Gordon* were cases that applied strict scrutiny.⁷ Strict scrutiny was necessary and appropriate in those cases because:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer v. Union Free School District, 395 U.S. 621, 628 (1969) (emphasis added).⁸

⁵ 393 U.S. 385, 393, citing *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Avery v. Midland County, Texas*, 390 U.S. 474 (1968).

⁶ The *Gordon* Court relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663 (1966); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); and *Carlington v. Rash*, 380 U.S. 89 (1965).

⁷ E.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-30 (1969).

⁸ Indeed, this Court has long considered "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and governmental action that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" to

In this case, the district court found that under the charter amendment only one group of people is required to amend the Cincinnati City Charter before it can obtain legislation for its protection and benefit. *Equality Foundation*, 860 F. Supp. 417, 433 (S.D. Ohio 1994). The court then held that the charter amendment's change to the structure of the Cincinnati city government prevented it from fairly representing that group of people. *Id.* at 433-34. Because petitioners' factual and legal challenge to the charter amendment questions the assumption of fair structure upon which "rational basis" scrutiny is founded, the presumption of constitutionality underlying that test is not applicable in this case. Instead, this Court's jurisprudence dictates that strict scrutiny must be applied.

III. THE SIXTH CIRCUIT'S DECISION, WHICH PURPORTS TO ALLOW MUNICIPAL GOVERNMENTS TO TAKE ACTIONS THAT WOULD BE FORBIDDEN TO STATE GOVERNMENTS, IS IN CONFLICT WITH DECISIONS OF THIS COURT APPLYING THE EQUAL PROTECTION CLAUSE.

In *Romer v. Evans*, this Court invalidated an amendment to the Colorado constitution that was markedly similar to the city charter amendment at issue here. Considering the effects of the Colorado amendment, which disqualified a class of persons from the right to seek specific protection from the government, this Court declared:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . .

116 S.Ct. 1620, 1628 (1996) (emphasis added).

be subjects requiring "more exacting judicial scrutiny." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Such policing of the process of representation is a matter uniquely within the competence of this Court. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 81-82, 120 (1980).

The Sixth Circuit offhandedly distinguished *Romer* by observing that the charter amendment pertained only to the City of Cincinnati, not to the entire State of Ohio. *Equality Foundation*, 128 F.3d 289, 297-301 (6th Cir. 1997). That putative distinction, however, is contradicted by settled precedent:

The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the state. . . . [I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government *are* the actions of the State.

Avery v. Midland County, Texas, 390 U.S. 474, 479-80 (1968). It is irrelevant whether the government that has denied some of its citizens equal protection of the laws is a municipality or a State: in either instance, the Equal Protection Clause is offended.⁹ The Sixth Circuit erred by ignoring this settled rule.

CONCLUSION

For the reasons set forth above, petitioners' request for a writ of certiorari should be granted.

Respectfully submitted,

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⁹ Compare *Hunter v. Ericson*, 393 U.S. 385, 392-93 (1969) (holding that the Fourteenth Amendment did not allow the City of Akron to create a legislative structure that disadvantaged a particular group by making it more difficult for that group to enact legislation on its behalf).